77-932

Supreme Court of the United States.

OCTOBER TERM, 1977.

No.

BOARD OF APPEALS OF SCITUATE,
PETITIONER,
v.
HOUSING APPEALS COMMITTEE AND
PLANNING OFFICE FOR URBAN AFFAIRS, INC.,
RESPONDENTS.

ON APPEAL FROM A JUDGMENT OF THE
MASSACHUSETTS SUPREME JUDICIAL COURT.

Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

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ON APPEAL FROM A JUDGMENT OF THE
MASSACHUSETTS SUPREME JUDICIAL COURT.

Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Board of Appeals of Scituate, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, which judgment denied Petitioner's Application for Further Appellate Review of the Judgment of the Appeals Court of the Commonwealth

of Massachusetts. That judgment finally denied Petitioner's Petition for Review filed in the Superior Court of Plymouth County, Commonwealth of Massachusetts, pursuant to the M.G.L. c. 30A, § 14. Said Petition requested that Court to (1) Annul the decision of Respondent Housing Appeals Committee (Committee) dated March 14, 1975; to affirm the decision of the Petitioner dated June 29, 1973, and to dismiss the Respondent Planning Office For Urban Affairs, Inc.'s (Planning Office) application, pursuant to M.G.L. c. 40B, for a Comprehensive Permit to construct forty (40) units of housing on a certain locus in the Town of Scituate, Massachusetts; or, (2) Annul the decision of the Respondent Committee and remand the case to the Petitioner with an order that the Respondent Planning Office submit to the Petitioner additional data and information required by State Law and/or the Town of Scituate's Rules and Regulations; or, (3) Modify the decision of the Respondent Committee by allowing the Petitioner to amend the five conditions relating to the conditional Comprehensive Permit and to allow the Petitioner to add additional conditions to insure that the Respondent Planning Office properly complete the project.

Opinions Below.

The Supreme Judicial Court of the Commonwealth of Massachusetts has issued an order denying Petitioner's Application For Further Appellate Review of the Decision of the Appeals Court of the Commonwealth which decision affirmed the opinion and judgment of the Superior Court of Plymouth County. A copy of the Judgment of the Supreme Court, the Appeals Court and the Superior Courts opinion and Judgment appear in the Appendix to this Petition at pages 11,13 and 14-28 respectively.

Jurisdiction.

The Judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered on September 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented.

Whether the decision of the Respondent Housing Appeals Committee in granting State aid to the Roman Catholic Archdiocese of Boston for the construction of forty (40) units of low-moderate income housing is unconstitutional in violation of the Establishment Clause of the First Amendment of the Constitution of the United States.

Constitutional Amendment Involved.

This case involves Amendment 1 of the Constitution of the United States. Said Amendment reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

Statement of the Case.

On May 1, 1973, the Respondent Planning Office submitted to the Petitioner an application, pursuant to M.G.L. c. 40B, §§ 20-23, for a comprehensive permit for construction of forty (40) townhouse-type dwellings to be situated on approximately five acres of land located in Scituate. The proposed dwellings are designed to be made available to low and moderate income families with subsidized financing provided by the Massachusetts Housing Finance Agency, a State agency pursuant to St. 1966, c. 708.

The property in question was purchased and paid for by Saint Mary's Parish (a Roman Catholic Church) for use as a cemetery, and title was taken in the name of the Roman Archdiocese of Boston. The developer is the Respondent Planning Office, an agency of the Archdiocese of Boston, and is acting at the request of the owner of such property, the Roman Catholic Archbishop of Boston. The property will be conveyed to the Respondent Planning Office prior to the closing of the mortgage loan from the State agency, the Massachusetts Housing Finance Agency.

It is the intention of the Roman Catholic Archdiocese of Boston and its adjunct, the Respondent Planning Office, to transfer title to such property to a proposed cooperative corporation owned by the potential occupants of said dwellings subsequent to completion and occupancy of the development.

After a properly conducted hearing before the Petitioner, with regard to the application of the Respondent Planning Office for a Comprehensive Permit, the decision of the Petitioner denying the application was filed on June 29, 1973. The Respondent Planning Office appealed that denial to the Respondent Committee.

After hearing and argument the Respondent Committee issued its decision on March 14, 1975, finding that the Petitioner's denial of the application was not consistent with local needs and was determined to be unreasonable.

Thereafter, on April 11, 1975, the Petitioner filed its Petition for Review in the Superior Court of Plymouth County, pursuant to the provisions of M.G.L. c. 30A, § 14.

On July 8, 1976, the Judgment of the Superior Court was entered denying the Petition for Review and affirming the decision of the Respondent Committee. On July 27, 1977, the Appeals Court affirmed the Judgment of the

Superior Court. Subsequently, on September 27, 1977, the Supreme Judicial Court denied the Petitioner's Application for Further Appellate Review.

The Constitutional issue which is the focus of this Petition was first raised by the Petitioner in the Superior Court of Plymouth County. The Complaint (Petition), as amended, contained the following language in paragraph 9(a)(a) thereof:

> "The Committee's decision is in violation of the First Amendment of the Constitution of the United States of America in that it renders state aid to a Religious organization, thereby constituting an establishment of Religion."

After hearing and Argument, the Justice of the Superior Court rejected the Petitioner's First Amendment argument finding there was no tendency to entangle the State excessively in Church affairs. (Appendix pp. 16-18). Thereafter, the Appeals Court adopted the decision of the Superior Court (Appendix p. 13) and the Supreme Judicial Court denied Further Appellate Review based thereon. (Appendix p. 11).

Reasons for Granting Writ.

The Petitioner has come to this Honorable Court seeking to have it review the decision entered by the Courts of Massachusetts in regard to the above-entitled action. The contention of the Petitioner, is that based upon the unique factual situation presented herein, the Massachusetts Courts have decided this action contrary to the intent and language of the First Amendment and the applicable decisions of this Honorable Court.

The command of the First Amendment that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," is applicable to the states through the due process clause of the Fourteenth Amendment. See, *Roemer* v. *Board of Public Works of Maryland,* 426 U.S. 736 (1976); *Everson* v. *Board of Education,* 330 U.S. 1, 8 (1947).

The First Amendment granted to the people of the United States one of the fundamental and basic rights for which they fought. That right was to be able to practice and worship without involvement between the church and the state. Although a system of government which makes itself felt as pervasively as ours hardly could be expected never to cross paths with the church, the Supreme Court has historically taken the view that a secular purpose and facial neutrality may not be enough if in fact the state is lending direct support to a religious activity. See, *Roemer* v. *Board of Public Works of Maryland, supra,* at 747.

The Respondent Planning Office has openly stated that it is in fact, affiliated with and part and parcel of the Catholic Church of the Archdiocese of Boston. Further, the financing of the proposed M.G.L. c. 40B development will be obtained from the Massachusetts Housing Finance Agency, an agency of the state government of the Commonwealth of Massachusetts. See, St. 1966, c. 708. Thus, in effect, what we have is a state agency directly financing the Church in a real estate development business.

In the case of *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), the Supreme Court, although admitting that it is not always easy to identify a state action which is violative of the Establishment Clause of the First Amendment, did state that the three main evils against which the Establishment Clause was intended to afford protection were "sponsorship, financial support, and active involvement

of the sovereign and religious activity", supra at 612; citing, *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970). Thus, the Supreme Court has succinctly stated that one evil from which we are protected by the Establishment Clause is financial support given by a government institution to any religious activity. The Petitioner submits that that is precisely the form of church-state entanglement which the Respondent Committee seeks to permit.

Although a long line of cases has established a three-pronged test to be considered in determining whether an action violates the Establishment Clause, a violation of any of the three factors involved is sufficient to render the action violative of the Constitution. See, *Lemon* v. *Kurtzman, supra.*

The three tests are as follows. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion (*Board of Education* v. *Allen,* 392 U.S. 236, 243 (1968)). Finally, the statute must not foster an excessive government entanglement with religion. *Lemon* v. *Kurtzman, supra* at 612-613; *Hunt* v. *McNair,* 413 U.S. 734, 741 (1973).

The Petitioner submits that the final test set forth in the previously cited cases, that is, that the action must not foster an excessive government entanglement with religion, has been blatantly violated by the action of both the Respondent Committee and the Massachusetts Housing Finance Agency.

A review of the case law developed under the First Amendment has disclosed no case directly on point with the instant factual situation. In the case of *Everson* v. *Board of Education,* 330 U.S. 1 (1947), a case which involved free bus transportation for parochial school pupils, the Supreme Court upheld a statute as constitutional.

The reasoning and logic behind the *Everson* decision, id., was that the statute did not breach the "wall of separation" between church and state, but merely provided a means of getting children to and from school. The decision emphasized that the state was in no way funding religious education, but was merely providing transportation. *Everson* is clearly not applicable to the instant situation.

The factual situation in our case discloses that state funding is going directly to a church interest, and, thus, there is a breach of the sacred "wall of separation." The fact that the archdiocese may or will in the future turn the project into a cooperative tenant development does not change the factual situation as it exists today. For this Court to allow a violation of the First Amendment because of some proposed future activity would be in clear violation of the intent of the Establishment Clause.

In the case of *Walz* v. *Tax Commission, supra,* the Supreme Court upheld the granting of a property tax exemption to religious organizations. The Court's rationale was that this procedure was neither sponsorship nor hostility, that it was simply the sparing of religion from the burden of property taxes levied on private, profit institutions, and, therefore, allows the church to abstain from supporting the state. An analysis of the *Walz* case discloses that the reason the Supreme Court allowed the tax exemption was that to act in a contrary manner would be permitting the church to support the state, thus piercing the wall of separation.

Applying the rationale of the *Walz* case to our instant factual situation clearly indicates that the proposed development is clearly in violation of the First Amendment of the United States Constitution. Allowing the state to finance a church development would, contrary to the reasoning applied in *Walz* v. *Tax Commission, supra,* permit a state agency to grant direct financial support to the church and thus violate the abstention philosophy set forth in the *Walz* case.

In the 1971 case of *Tilton* v. *Richardson,* 403 U.S. 672 (1971), the Supreme Court found constitutional a government grant of construction financing to certain colleges, some of which were religiously affiliated. That type of financing was upheld as Constitutional, on the ground that the aid was a one time grant for religiously neutral buildings, and, thus, the "wall of separation" between church and state was not breached. Admittedly, the Supreme Court in *Tilton* drew a very fine line regarding the church and state involvement issue, but the *Tilton* case hinged upon the fact that it was merely a one time grant. The instant factual situation reveals that the Massachusetts Housing Finance Agency funding is not a one time grant, but in fact extends over a period of time.

Another distinguishing factor is the considerable tax benefit which will be accorded the church under the proposed development. Again, the fact that the Respondent Planning Office might convey the property to a cooperative tenant organization some time in the future after construction and occupancy does not veil the fact that, for a period of time at least, the state will be funding a religious activity. Thus, the Board submits that the *Tilton* v. *Richardson, supra,* decision was based upon a unique factual situation and is inapplicable to the instant controversy.

Accordingly, in light of the fact that the granting of government (state) financing by the Massachusetts Housing Finance Agency to the Respondent Planning Office (Archdiocese) discloses and fosters excessive government entanglement with religion and, thereby, breaches the

"wall of separation" between church and state which has been established by the First Amendment of the United States Constitution, the instant decision should and must be reviewed due to the flagrant violation of the First Amendment to the United States Constitution occasioned thereby.

Conclusion.

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

The Petitioner,
By its attorneys,
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APPENDIX.

Order of Massachusetts Supreme Judicial Court.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON, September 27, 1977.

ORDER

It is hereby ORDERED, that the following Applications for Further Appellate Review be denied:

M-797 BOARD OF APPEALS OF SCITUATE
v.
HOUSING APPEALS COMMITTEE
(Appeals Court No. 76-590; Plymouth Superior No. 75-1348)

Journal Entry.

MASSACHUSETTS SUPREME JUDICIAL COURT DOCKET.

No. M797

BOARD OF APPEALS OF SCITUATE
VS.
HOUSING APPEALS COMMITTEE

COUNSEL FOR PLAINTIFF	COUNSEL FOR DEFENDANT
Walter H. McLaughlin, Jr.	Paula Rosen
William F. York	James Dolan

Plymouth Superior
#75-1348
A.C. 76-590

Entered August 16, 1977

8/16/77 Plaintiff's Application for Further Appellate Review.

8/26/77 Defendant's opposition to Further Appellate Review filed by James G. Dolan, Jr.

9/27/77 Application for Further Appellate Review DENIED.

December 21, 1977
A true copy.

Attest: /s/ William M. Cloran
William M. Cloran,
Assistant Clerk for the Supreme
Judicial Court for the Commonwealth
of Massachusetts

Opinion and Judgment of the Massachusetts Appeals Court.

P. 76-590 Appeals Court

BOARD OF APPEALS OF SCITUATE *vs.* HOUSING APPEALS COMMITTEE & another.

The only two points argued on appeal were properly decided by the trial judge for the reasons stated in his findings of fact and conclusions of law.

Judgment affirmed.

Opinion of the Superior Court.

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
Civil Action
No. 1348

ROBERT M. ALEXANDER, PAUL J. CORELL, ROBERT D. LORING, as they are members of the ZONING BOARD OF APPEALS OF THE TOWN OF SCITUATE,
Plaintiff,

vs.

DOROTHY ALTMAN, WILLIAM C. AMES, MAURICE CORMAN, C. WESLEY DINGMAN, PETER GARLAND, as they are members of the HOUSING APPEALS COMMITTEE
and
THE PLANNING OFFICE FOR URBAN AFFAIRS, INC.

This is a petition for review filed pursuant to the provisions of G.L.C. 30A, Sec. 14, by the Zoning Board of Appeals of the Town of Scituate. It seeks review of a decision of the Housing Appeals Committee of the Department of Community Affairs which vacated a decision of the Scituate Zoning Board of Appeals, the Plaintiff herein, denying the application of the Planning Office for Urban Affairs, Inc., a corporation organized under G.L.C. 180, for a comprehensive permit to build low and moderate income housing.

1. On or about May 1, 1973, the Planning Office for Urban Affairs, Inc., submitted to the Zoning Board of

Appeals of the Town of Scituate an application (pursuant to G.L.C. 40B, Sec. 20-23) for a comprehensive permit for construction of forty townhouse-type dwellings on approximately five acres of land located at the southeasterly intersection of Stockbridge Road and Meeting House Lane in Scituate.

2. The proposed dwellings are designed to be made available to low and moderate income families with subsidized financing to be provided by the Massachusetts Housing Finance Agency.

3. Subsequent to the completion and [occupancy] of the dwellings, the mortgagor corporation would transfer title to a new cooperative corporation owned by the occupants of the dwellings.

4. After a properly conducted hearing before the Zoning Board of Appeals, a written decision denying the application was filed with the Town Clerk on June 29, 1973.

5. The Planning Office appealed that denial to the Housing Appeals Committee. After a view of the premises by members of the Committee and counsel, adjudicatory hearings were held on five separate dates from August 7, 1973, to October 4, 1973.

6. On March 14, 1975, the Housing Appeals Committee issued a decision finding the Zoning Board's denial of the application not to be consistent with local needs and to be unreasonable. The Committee issued an order vacating said decision and directed that the comprehensive permit be issued, but specified conditions. (Record 30, pp. 29-31, attached to Petition for Review.)

7. The Zoning Board has appealed the decision of the Housing Appeals Committee to this Court pursuant to G.L.C. 30A, Sec. 14, seeking determination of the following issues specified in its Brief:—

(1) Whether the decision of the Housing Appeals Committee in granting state aid to the Planning Office for Urban Affairs, Inc., a part of the Roman Catholic Archdiocese of Boston, is unconstitutional in violation of the establishment clause of the First Amendment of the United States Constitution.

(2) Whether the decision of the Housing Appeals Committee was legally and properly rendered in accordance with the requirements of G.L.C. 30A, Sec. 11(7).

(3) Whether the decision of the Housing Appeals Committee was arbitrary, capricious, and unsupported by substantial evidence.

8. *The First Amendment Issue.*

This issue was added by an Amendment to Plaintiff's Complaint adding Paragraph 9(a)(a). "The Committee's decision is in violation of the First Amendment of the Constitution of the United States of America in that it renders state aid to a religious organization, thereby constituting an establishment of Religion." (Other constitutional issues raised by an Intervenor, before the Committee, one Peter Kennedy an abutter who has moved to California, were disposed of by the Hanover[1] case and by Mahoney v. Board of Appeals of Winchester.[2]) Plaintiffs argue that because the C. 180 corporation is an arm of Roman Catholic Archdiocese of Boston, and since financing of the proposed low and moderate income housing development is to be by a State agency, MHFA,[3] "the wall of separation" between church and State will be breached, — there will be "an excessive entanglement with religion." The argument relies on Walz v. Tax Commission, 397

[1] Board of Appeals of Hanover v. Housing Appeals Committee, etc., 363 Mass. 339.

[2] 1974 A.S. 1419, 420 U.S. 903, 4 L E 2nd 834, 95 S.C. 822.

[3] Under C. 708, Acts 1966, as amended.

U.S. 664, 668 (1970), Lemon v. Kurtzman, 403 U.S. 602 (1971) and Hunt v. McNair, 413 U.S. 734, 731 (1972) and attempts to distinguish Tilton v. Richardson, 403 U.S. 672 (1971) on the ground that the financing of religiously affiliated colleges in that case was "a one-time grant" and this proposed financing extends over a period of time. However, Law Week, Vol. 44, No. 50, Page 4939 reports the United States Supreme Court decision of June 21, 1976, in the case of John C. Roemer, III, et al vs. Board of Public Works of Maryland. That decision clearly indicates that adoption of Plaintiff's First Amendment argument would be tantamount to placing barbed wire on top of the wall separating church and State. Here the concern is for people of low and moderate income whose housing needs are not being adequately met according to standards set by State statute. This is certainly a secular purpose. The occupants of the dwellings will be the ultimate owners through a cooperative corporation. The occupants will be chosen by measurements of need, and no discrimination because of race, color, religion or national origin will be permitted.[4] The Archdiocese is not only providing, donatively if necessary, land for the site, but has already expended obviously substantial sums for this project since the inception of the program over *three years ago.*[5] The selection of tenants will not only be non-discriminatory, but the ecumenical clergy of Scituate and the Scituate Housing Authority will be asked to participate in the entire selection process of occupants of the housing,[6] who

[4] Record No. 32-3, (Appellant Exhibit 3 before HAC) pp. 4, 5, 7, 11 and 12.

[5] Record No. 32-3, Pg. 8, middle paragraph.

[6] Record No. 32-3, Pg. 12.

(a) References to *Record* are to Index of items in Certification by HAC Chief Counsel. Note that Items 32, 33 list HAC hearing Exhibits. *Record* items 6, 11-14, and 16 are the 5 transcript volumes of HAC hearing.

will become the owners of the premises through the co-operative corporation. The First Amendment issue is in this case a mere figment. There is here "a secular purpose, a primary effect other than the advancement of religion, and no tendency to entangle the State excessively in church affairs." Roemer v. Board of Public Works of Maryland supra @ 4942.

9. *WAS THE HAC DECISION IN ACCORD WITH THE REQUIREMENTS OF G.L.C. 30A, SEC. 11(7)?*

Plaintiffs contend there was non-compliance with Sec. 11(7) which requires that "if a *majority* of *the officials* of the agency *who are* to *render* the *final decision* have neither heard nor read the evidence" there must be "a tentative or proposed decision" and "an opportunity — to file objections and to present argument" (underlining supplied).[7] In this case the hearing members were three in number. (The other two agency members having qualified as such after the hearings commenced chose not to participate.) Therefore, the three hearing members were those "officials of the agency *who* are to render the final decision." Two of the those three were present at all hearings, and the third read the briefs and *portions* of the transcript. Therefore, there was no necessity for submission of a tentative or proposed decision and opportunity to file objections and to present argument. The two who were present at all hearings were "a majority of the *officers* of the agency *who* are to render the final decision" (underlining supplied). Plaintiff's argument contending non-compliance with Section 11(7) is based on a misinterpretation of the decision in Board of Appeals of Maynard vs. Housing Appeals Committee, Mass. Ad. Sh. (1976) 902, 904. In that case, as in this, a majority of three hearing members either attended hearings or read

[7] G.L.C. 30A, Sec. 11(7).

transcripts, and they also gave the board of appeals a proposed decision and an opportunity to file objections and present arguments. The Court upheld the propriety of the procedure "both on the ground that a majority of the deciding officials heard or read the evidence and on the ground that there were a *proposed decision* and a *statutory 'opportunity.'*" Plaintiff attempts to elicit from the Court's language that if there had not been a proposed decision and a statutory opportunity it would not have ruled the procedure proper. Such a negative pregnant is impermissible in the light of the plain English meaning of the statute. If the statutory words were "a majority of the officials of the agency *which is to render* the final decision" there would be merit to plaintiff's argument, but the statutory words are "*who are to render,*" — so that when three out of five agency members are the hearing officials and a majority of the three either hear or read the testimony, there is no necessity for a tentative or proposed decision and a statutory opportunity. Because in the Maynard case HAC gilded the lily by unnecessarily submitting a proposed decision and giving an opportunity for objection and argument does not mean that the statutory language has any different meaning than the plain English meaning apparent in reading it, and the Maynard decision has not "established a two-tiered requirement" as the Plaintiff argues in its brief. Moreover, the argument in the brief that a contrary decision would violate "the constitutional due process rights of all parties" is a bald assertion with no case or rationale to support it.

10. *WAS THE HAC DECISION SUPPORTED BY SUBSTANTIAL EVIDENCE?*

Board of Appeals of Hanover v. Housing Appeals Committee, 73 AS 491 defines substantial evidence as: "such evidence as a reasonable mind might accept as adequate to

support a conclusion" (P. 523). The Court must take into account evidence that detracts from the weight of the supportive evidence (P. 523).

The Committee in reviewing the Board's decision must determine whether the granting of the permit would be reasonable and consistent with local needs. In determining whether it is consistent, Sec. 20 provides that the Board should consider and balance the regional need for low and moderate income housing against any objection to the details of the proposed plan. This requires a consideration of the regional need with the number of low income persons in the city or town affected (*Hanover*, P. 513) and with the local need to protect health and safety of the occupants and residents of the town, and to promote better site and building design in relation to the surroundings, or to preserve open spaces, G.L.C. 40B, Sec. 20.

I. *REGIONAL NEED.*

Plaintiff concedes, Page 2 of its Brief, that the Town has not met one of the three housing requirements of G.L.C. 40B, Sec. 20.

As to Regional Need the Committee heard testimony by Anton Finelli, a staff member of the Planning Office; by Stephen Dubuque, a staff member of the South Shore Community Action Council; and from Ms. Majorie Gardinier, an administrator of the surplus food distribution program in the Town of Scituate. Their testimony was based upon data obtained from the 1970 U.S. Census, the guidelines of the Department of Community Affairs and HUD guidelines for public housing eligibility, and from MAPC and MHFA reports and data.

Neither the Town Board nor the intervenor introduced any rebuttal evidence on the issues of regional need or on

the number of low income persons residing within the Town of Scituate. Plaintiff's Brief deprecates the evidence offered on regional need but fails to show that it was not substantial. There was substantial evidence before the Committee showing that there are 251,052 households in the Boston Standard Metropolitan Statistical Area (which includes Scituate) eligible for low income housing. An additional 166,728 more were eligible for moderate income housing (Tr. 2:54). The eight town regions studied (including Scituate, Hull, Cohasset, Norwell, Hanover, Marshfield, Pembroke, and Duxbury) contain 1,966 families on public assistance who would be eligible for public housing and 2,253 families whose income is between $2,100-$9,000 who are paying more than 25% of their incomes for rent. There are only 96 units of low income housing in the eight-town area (Appellant's Exhibit No. 7A).

Further testimony showed that 212 Scituate families were receiving surplus food (Tr. 2:36); 637 Scituate families are eligible for low income housing in Scituate; and that there were 1,108 moderate income families (Tr. 2:44-5).

There was substantial evidence before the Committee showing that there existed a regional and local need for moderate and low income housing. Record No. 30 (HA[C] Decision), pp. 7, 8, 9.

II. *SEWAGE.*

The proposed system was described to the Committee by Joseph Schneider, the applicant's Consulting Engineer. The system would use an underground duplex pump to pump the sewage to a point in Meeting House Lane where it would flow by gravity through a proposed new gravity line which the applicant would construct, to connect to

the existing public sewer main in Kent Street (Tr. 4:23-4). A standby electric generator would also be provided in the event of a town power failure. The Town Sewer Supervisor, Mr. Gordon Lampert, testified that he saw no technical problems with the proposal (Tr. 4:61) and Mr. Francis Obert, the Town Consultant on sewage found the entire plan to be acceptable and in accord with sound engineering practice (Tr. 4:61).

The policy of the Committee in not requiring a detailed sewage plan, and its reliance on preliminary plans does not appear to be unwarranted, where such detailed plans are later subject to approval of the State funding agency and must meet the State Sanitary Code. (See *Hanover*, P. 528-9). Consequently, there was substantial evidence before the Committee showing that the sewer system did not pose any threat or danger to the health and safety of the public.

III. *DRAINAGE.*

The Committee heard the testimony of Peter Ogren, a Civil Engineer from the Hayes Engineering Company, the applicant's drainage consultant. He testified that he had visited the site, attended meetings, made tests, and designed the system.

He testified that the site lacked ground-water in the spring down to a depth of 4 feet (Tr. 4:17). After three soil tests, the percolation rate was found to be adequate for use as a sewage disposal field, a more intensive use than mere drainage (Tr. 4:14). The increased surface drainage would be handled by increased site storage capacity, and the site will be graded so that heavy rain runoff would be guided to a leaching trench, permitting the rain to leach into the soil (Tr. 4:15).

Plaintiff contends that reliance on a preliminary plan is not enough, and a detailed plan is necessary. However,

in *Hanover*, (see P. 529-9), the Court specifically determined that an applicant need not go to the expense of submitting detailed plans at the permit stage, since these plans had to meet State standards. There was substantial evidence showing that the proposed drainage plan did not endanger the health, safety and welfare of the residents of the surrounding area.

IV. *TRAFFIC.*

The Committee heard testimony on this issue from Stanley Siegel, a traffic engineer hired by the applicant, and from Ms. Dorothy Page, a local resident, appearing for the Scituate Zoning Board of Appeals.

Mr. Siegel made three traffic volume studies and visited the site on several occasions. He concluded that an adequate line of sight existed in both directions from the Stockbridge Road parking lot and found that no traffic hazard was presented (Tr. 4:59). The Board contends that Mr. Siegel made no study on weekends. However, this point is specifically referred to in the decision of the Committee (P. 14) and it can be inferred that it was considered by the Committee in making their determination. It does not, in and of itself, require a finding that their decision was unsupported by substantial evidence.

Ms. Page testified as to her personal observations over a long period of time, including her having to wait to cross the street for long periods of time, and the screeching of brakes in the area (Tr. 4:30). She testified that traffic was heavier on the weekends due to trips to the dump on Stockbridge Road, but also testified that the scheduled closing of the dump would help a lot (Tr. 4:31). There was substantial evidence before the Committee showing that no health or safety hazards will be created by the increased traffic in the area due to the project.

V. *SITE AND BUILDING DESIGN.*

(The HAC was required to consider this element in determining whether the project was "consistent with local needs," site and building design in relation to surroundings or to preserve open spaces.)

There was evidence before the Committee that the location of the site was suitable for the proposed purposes. The locus is level and open, it is convenient to schools, shopping and the facilities of the Town, and is convenient to existing water and sewer facilities. Mr. Brown, a planner and landscape artist, testified that it was an excellent site for the proposed use (Tr. 3:47), and Mr. John Clancy, the Architect, was impressed with the suitability of the site (Tr. 3:44).

The Board argues that the proximity of the site to Wheeler Park, an elderly housing development, would contravene a legislative policy that subsidized housing should be dispersed. However, the Board can show no clear rule that would require a finding that the location of one *low* and *middle income* housing development adjacent to a housing project for the elderly would be contrary to local need.

The Committee took the proximity of the project to Wheeler Park into consideration and specifically declined to find that the proposed housing would have a detrimental effect on the neighborhood (Decision P. 21-2).

The Board further argues that the site plan was inadequate due to the historical nature of the area, and due to the architectural unity of the area. Again the Committee heard extensive evidence on this point, and considered the impact the proposal would have on the area.

The Committee took note that although neither the Mann House nor the men of Kent Cemetery were in the National Register (Tr. 5:41), the Mann House according to Miss

Polly Ann Matherly Rettig, Historian of the Massachusetts Historical Committee, was an obvious choice for nomination (Appellee's Exhibit No. 9).

Miss Rettig testified that the addition of the development to the area would *not* result in the denial of a subsequent application to have the area officially designated as an historic area (Tr. 5:59-60). In addition, in a letter from Ms. Rettig to Rev. M. F. Groden, she specifically noted that historic districting should be used as a tool to promote high quality designs and to achieve a "compatible mix of traditional and modern architectural styles."

There was testimony that there was no predominant style of buildings in the area, except that it was an area of primarily single family residences. Mr. Chaloff, the Board's architectural witness, noted that the character of the area was mixed (Tr. 4:10). The townhouse was found to be an appropriate form of multi-family housing for use in this specific area by the applicant's consultant (Tr. 3:49). The Multi-Family Housing Study prepared by the *Town's* planning consultant recommends the use of townhouses as a transition between single residences and garden apartments (Appellant's Exhibit 11).

The Board further alleges several defects in design. Their witness testified that a number of the proposed units did not meet FHA minimum standards. However, this project is being financed by the MHFA, and the plans will need to meet the MHFA standards.

There was substantial evidence before the Committee upon which it could properly base its decision.

VI. *LOCAL EFFORT.*

The final argument presented by the Board was that the extent of local effort by the municipality to meet its

minimum requirements as set forth in G.L.C. 40B, Sec. 20, is to be considered.

The Town of Scituate currently has 80 subsidized housing units, 15 leased rental assistance units and approval for 82 additional subsidized housing units (Tr. 1:20). The local need has been previously dealt with. G.L.C. 40B, Sec. 20, specifies criteria for determining whether these needs have been met. These criteria have not yet been met, and the local effort to meet these requirements does not necessarily demand denial of this application. The municipality's failure to meet its minimum housing obligations provides substantial evidence that the regional need for housing does in fact outweigh the objections to the proposal. *Hanover,* P. 515. Most of the Town's effort has been confined to housing for the *elderly,* very little to housing for low-income families, and none for a project such as that here in question, one for mixed *low* and *moderate income* families. The evidence is substantial and the Court finds that local effort has been inadequate.

11. Adverted to in oral argument but not in the Plaintiff's Brief was a contention of lack of due process because HAC took notice of and relied on a post-hearing negative Environmental Assessment Form by MHFA dated November 6, 1973, which "received concurrence of the Secretary of Environmental Affairs on January 23, 1974." (Record No. 30 (HAC Decision) pp. 27-8.) HAC relies on regulations filed by Department of Environmental Affairs dated December 31, 1974, published January 8, 1975, a certified copy of which are attached to the Attorney General's Brief and marked "B". Perhaps failure to argue this aspect in the Plaintiff's Brief is due to the fact that it does not deny the facts of which HAC took notice, viz., an MHFA negative EAF, and the concurrence of the Secretary of Environmental Affairs as well as the

Regulations of the Department. (See Bailey v. Board of Appeals of Holden, Mass. AS 1976, 945, 949, Footnote 5.) The Board could have specified as a condition of the comprehensive permit that it not be implemented until MHFA had complied with G.L.C. 30. This Court has authority to amend the HAC decision in like manner and is doing so to avoid any prolongation of this dispute, and to resolve this issue.

12. Judgment is to be entered that the Decision of the Housing Affairs Committee was based on substantial evidence and is affirmed with an amendment, that a condition be added to those specified by the Committee, viz., that the comprehensive permit be not implemented unless and until it appears as a matter of record that Massachusetts Housing Finance Agency has complied with the requirements of G.L.C. 30 in respect to this project.

/s/ Joseph K. Collins
Associate Justice of the Superior Court

Entered: June 28, 1976

Judgment of the Superior Court.

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss

SUUPERIOR COURT
CIVIL ACTION
No. CA75-1348

ROBERT M. ALEXANDER ET ALS.,
Plaintiff(s)

vs.

DOROTHY ALTMAN ET ALS.,

JUDGMENT ON FINDINGS BY THE COURT

This action came on for (trial) before the court, Collins, J. presiding, and the issues having been duly (tried) and findings having been duly rendered,

It is ORDERED and ADJUDGED as follows:

1. That the Decision of the Housing Affairs Committee was based on substantial evidence and is affirmed with an amendment, that a condition be added to those specified by the Committee, viz., that the comprehensive permit be not implemented unless and until it appears as a matter of record that Massachusetts Housing Finance Agency has complied with the requirements of G.L.C. 30 in respect to this project.

Dated at Plymouth, Massachusetts, this 30th day of June 1976.

FORM OF JUDGMENT APPROVED:
/s/ Joseph K. Collins, J.
Associate Justice of the
Superior Court

ARTHUR T. MURPHY, CLERK
By: /s/ Gregory R. Baler
Assistant Clerk

MRCP Form 9A 5-7-75

Decision of the Housing Appeals Committee.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF COMMUNITY AFFAIRS
HOUSING APPEALS COMMITTEE

PLANNING OFFICE FOR URBAN AFFAIRS, INC.

v.

SCITUATE BOARD OF APPEALS

DECISION

I. *STATEMENT OF PRIOR PROCEEDINGS*

The Planning Office for Urban Affairs, Inc.,[1] a chapter 180 nonprofit corporation, submitted to the Zoning Board of Appeals of the Town of Scituate[2] an application under chapter 774[3] for a comprehensive permit to construct forty units of low income, town-house type co-operative housing, on a site at the intersection of Stockbridge Road and Meeting House Lane in Scituate, with subsidy financing from the Massachusetts Housing Finance Agency (M.H.F.A.).

After due notice, an administrative (non-adjudicatory) hearing was duly held by the Board, which, on July 1973 filed its decision denying the application.

From that denial, the Appellant appealed to the Housing Appeals Committee (H.A.C.). After a site visit, attended by members of the Committee, its counsel, and counsel for all parties, the Committee conducted an adjudicatory hear-

[1] Hereinafter referred to variously as "Appellant", "Petitioner", "Applicant".

[2] Hereinafter referred to variously as "Appellee", "the Board".

[3] St. 1969 c. 774, now G.L. c. 40B ss. 20-23, hereinafter referred to as "Chapter 774), "the Statute". Sections 20-23 of c. 40B maybe mentioned without repeating c. 40B.

ing on the appeal, a provided by the Statute, covering five sessions. Witnesses were sworn and full right of cross examination was afforded all parties. At the initial hearing Peter Kennedy, Esq., an abutter, was permitted on motion to intervene as a party to the proceedings.

II. *Issues*

The Statute provides that the sole issue before the Committee is whether the denial by the Board is "consistent with local needs" as that phrase is defined in section 20. In fact the Statute uses the phrase "reasonable and consistent with local needs". The Appellee contended, in effect, that it was part of the Appellant's burden of proof to show that the denial was not "reasonable" as well as not "consistent with local needs". In ruling against this contention, and against the introduction of evidence solely on the issue of reasonableness, the Committee followed the ruling of the Supreme Judicial Court in the Hanover Case,[4] which held that the word "reasonable" in the Statute is surplus verbiage, and is subsumed in the phrase "consistent with local needs".

Under the statutory definition in section 20, the denial by the Board is "consistent with local needs" if Scituate has met one of three mathematical criteria relating to the existing number of subsidized units, the geographical area occupied by subsidized units, or the percentage of total units constructed in the calendar year which were subsidized.

It was conceded that Scituate has not met any of these three mathematical statutory criteria.[5]

[4] Board of Appeals of Hanover v. Housing Appeals Committee Board of Appeals of Concord v. Housing Appeals Committee 1973 Mass. Adv. Sh. p. 491; 294 NE 2nd 393 hereinafter referred to variously as the "Hanover Case" or "the S.J.C. decision".

[5] Tr. 1:21. See also Appellant Exhibit No. 11, p. 46 Appellee's brief, page 2.

A second test for consistency with local needs, as set out in the statute in section 20, and as further defined in the Hanover decision, requires that considerations of health and safety, and the requirements of site and building design, and open space, be weighed against regional need for this housing, together with the number of low income persons in Scituate.

The Appellee and Intervenor contended that regional need had not been proved, and produced evidence and argument that hazards to health and safety, and objections to site and building design, existed, or would be created by this construction, of such gravity as to outweigh regional need. The facts are set out in the separate discussion of each of these subjects below.

Before discussing the several items included in the general issue of consistency with local needs, we deal with two jurisdictional issues raised by the Intervenor: (1) whether Chapter 774 violates the equal protection and due process provisions of the U.S. Constitution; (2) whether the Apellant has sufficient title to permit it to build this housing.

A. *Constitutionality*

The rulings of the S.J.C. in the Hanover Case, which empowered Boards of Appeal, and the Housing Appeals Committee, to override local zoning by-laws, and even votes of the Town Meeting, were, the Intervenor argued, repugnant to the federal constitution, citing Belle Terre v. Borass, 94 S. Ct. 1436 ( ), the Valtierra case, and a comment in a 1979 law review article.[6]

[6] The Belle Terre decision upheld as a valid exercise of police powers a local ordinance limiting occupancy to families, or groups of not more than two unrelated parties.

In James v. Valtierra, 91 S. Ct. 1331 (1970) the court upheld a state constitutional provision that required a local referendum decision on subsidized housing.

The need to prove the non-applicability of these authorities is eliminated by the recent decision in Mahoney v. Board of Appeals of Winchester[7] where the Massachusetts S.J.C. affirmed the Hanover rulings, and specifically rejected the argument that Chapter 774 denied equal protection of the laws, and due process under the fourteenth amendment to the U.S. Constitution and the Massachusetts Declaration of Rights. In the subsequent appeal to the U.S. Supreme Court the briefs of both parties dealt fully with the issues of "equal protection" and "due process". A motion was filed to dismiss the appeal. The court, in a one line decision allowed the motion, ruling that no substantial federal question was involved.[8]

B. *Appellant's Title*

The Intervenor introduced evidence through Paul Quinn that the land in question was purchased and paid for by St. Mary's parish for use as a [cemetery] and title taken in the name of the Roman [Archdiocese] of Boston because St. Mary's was unable to take title.[9]

See "1970 Annual Survey of Massachusetts Law" p. 491 quoted in part on page 3 of the Intervenor's brief as follows:

> "There are a number of problems with Chapter 774 which will have to be solved by legislative amendment or by administrative or court action:
>
> (a) The act nowhere explicitly gives a town board of appeals the power to override zoning by-laws."

This "problem" was "solved" in the first instance by administrative action: its Hanover decision ruling that Chapter 774 did in fact give local boards power to override zoning by-laws, and in the second instance by court action: the decision of the S.J.C. in its Hanover decision upholding H.A.C.'s rulings.

[7] 316 N.E. 2nd 606, 609.

[8] "The Appeal is dismissed for want of a substantial federal question." Mahoney v. Board of Appeal of Winchester. U.S. Supreme Ct. #74-693 Jan. 27, 1975.

[9] Tr. 4: 36BA-39BA.

The Intervenor argues that on these facts a trust is created under the law for the beneficial use of St. Mary's parish, the Archdiocese holding bare legal title.[10]

The Intervenor argues in his brief that in arriving at its decision HAC should "take into consideration . . . the insensitive insistence of the Appellant to try to take away from the local parish land it bought for purposes now needed . . ."

The Committee has held in previous decisions that an applicant for a comprehensive permit need show only a "color or title" to have standing to maintain his application, basing that decision on the case of Dion v. Waltham.[11]

The S.J.C. in the Hanover decision ruled that with respect to the more definitive question of title, HAC may defer that decision to the subsidy funding agency, which, in making the mortgage loan, is the agency particularly concerned with the applicant's title.

The Intervenor himself in his brief states that . . . "this committee admittedly does not have authority to try title to land . . ."[12]

While we do not concede that we have no power to inquire into questions of title, and to make findings and rulings thereon, should such an issue become particularly germane in a particular set of circumstances, H.A.C. has in a previous decision, where the issue of title was far more germane, but not essential to its decision, deferred the title contest to a separate action in the Land Court or Equity Court.[13]

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[10] Citing Scott on Trusts (3rd edition) Sec. 404. William v. Commercial Trust Co., 276 Mass. 508, 517. Kennedy v. Innes, 339 Mass. 195, 200

[11] 344 Mass. 511, 1962; See H.A.C. Decision Country Village v. Hanover Board of Appeals.

[12] Intervenor's brief, page 5

[13] Riverside Realty Trust v. Board of Appeals of Chelmsford, H.A.C. decision.

The original application of the Appellant to the Board is attached as Exhibit A to its Appeal to H.A.C. This application states at the end of the first paragraph that the Appellant "is an agency of the Archdiocese of Boston and is acting at the request of the owner, the Roman Catholic Archbishop of Boston, who will convey the property to the Applicant prior to the closing of the mortgage loan".

C. *Consistency With Local Needs — Regional Need*

In the process of balancing regional need against health, safety, design and other valid planning objectives, in order to determine if the Board's denial was "consistent with local needs", we examine first the issue of regional need, since this was a subject of sharp disagreement between the parties.

The language of the statute requires us, in assessing regional need, to do so "together with the number of low income persons" in Scituate.

Evidence on the subject was presented on behalf of the Appellant by Anton Finelli, a staff member of the Planning Office for Urban Affairs, Stephen Dubuque, a staff member of the South Shore Community Action Council, and Ms. Marjorie Gardinier, an administrator of the surplus food distribution program in Scituate, based on data from the 1970 U.S. Census, Department of Community Affairs and H.U.D. guidelines for public housing eligibility, and M.A.P.C. and M.H.F.A. reports and data.

The evidence relating to regional need is summarized in footnote[14] below, and evidence relating to the number of

[14] Comparison of 1970 U.S. census for figures with D.C.A. and H.U.D. guidelines shows 251,052 households in the Boston S.M.S.A. statistical area (which includes Scituate) eligible for low-income housing, and 166,728 more eligible for moderate income housing Tr. 2:54. The Boston S.M.S.A. is a part of the 101 municipality Metropolitan Area Planning Council Region, which contains Scituate. The eight town region of Hull, Cohasset, Scituate, Norwell, Hanover, Marshfield, Pembroke and Duxbury contain 1,966 families on public assistance, who would be eligible for public housing, 2,000 families with incomes between $3,721 and $4,651 who would also be eligible for public housing and 2,253 families with annual incomes between $2,100 and $9,000 who are paying more than 25% of their incomes for rent. There are only 96 units of low income family housing in the eight town area. (Appellant's exhibit #7A).

low income persons in footnote[15]. Neither the Appellee nor the Intervenor introduced rebutting evidence on the issue of regional need or the number of low income persons in Scituate, relying instead on cross examination of Appellant's witnesses and arguments in the Appellee's brief to weaken and discredit the Appellant's presentation.

Admittedly, what constitutes the "region" is not as sharply defined in the statute as are the parameters of the mathematical criteria. Even harder to define, from the point of view of counsel who must prove it, is the concept of need. Statistics covering the twelve-town area of the South Shore Community Action Council, which includes Scituate, have probative value, as do those covering the region of the Metropolitan Area Planning Council which also includes Scituate. The M.A.P.C. Region, is generally understood to be the "region" intended by the statute, for those municipalities within it. For that reason, Mr. Dubuque, at the Committee's request, refined his statistics to cover only that eight-town portion of the South Shore Community Action Council area which lies within the region of M.A.P.C. (See Appellant Exhibit No. 7A). Appellant's Exhibits 5 and 6 also relate to the M.A.P.C. region. As the

[15] At the time of the hearing 212 Scituate families had established eligibility for, and were receiving surplus food, Tr. 2:36. Of these families, one third were elderly, and two thirds were low income families with children (Tr. 2:37). There are 637 Scituate families eligible for low income housing in Scituate (Tr. 2:44-5). For further detailed data see Worcester Census Service Table 128 (Appellant Exhibit #6).

Appellant correctly pointed out in his brief on page 5, H.A.C. has already found regional need in six previous decisions involving municipalities in the M.A.P.C. region, and there is no evidence in this case to indicate that that need has been met.

We find that there is a regional need for low income housing together with a substantial number of low income persons in Scituate.

D. *Consistency With Local Needs: Health and Safety Hazards*

The Appellee contended that even if H.A.C. should make a finding of regional housing need, the extent of the housing need is far outweighed by health, safety and planning considerations advanced by the Local Board as grounds for denying the comprehensive permit under the general heading of health and safety. The Appellee pointed, in particular, to sewage, drainage, and traffic hazards.

1. *Sewage*

The Board decision found that "the proposal for sewage disposal was a major obstacle."

The Appellant's consulting engineer, Joseph Schneider, described the proposed sewage system. A duplex station would be installed on the site to pump the sewage to a point on Meeting House Lane where it may flow by gravity through a new gravity line to be constructed by the Appellant into the existing sewer main in Kent Street, (Tr. 4:23-4).

The duplex system would include a stand by electric generator to service the pumps in the unlikely event of a town power failure. The gravity line to be constructed by the Appellant is part of the town's programmed sewer system, and is to be constructed at no cost to the town.

The explanation of the proposed sewage arrangements is simple and lucid. We fail to see where there is any

"major obstacle". The Appellee argues that the Appellant should provide detailed sewage plans. We have repeatedly ruled that such detailing is an unfair burden to place on the developer at the application stage. The required detailing will come later, if a comprehensive permit is granted, to satisfy the requirements of the funding agency and the state sanitary code.

We do not read a "potentially dangerous health hazard" into Mr. Schneider's perfectly frank and inevitable reply, on cross examination, when asked what would happen if the pumps failed to function, "the forty dwelling units would be divorced from the sewer system", (Tr. 4:24). The same would be true if *any* system of sewage pumps, anywhere, failed to function.

The Board's decision states, with relation to the proposed sewer line to be constructed by the Appellant, "This may not be feasible or permissible, and the alternative would be an on-site disposal field which we do not feel could handle a proposal of this magnitude."

The suggestion about an on-site disposal field is purely speculative. The practice of having developers construct feeder lines between their development and the nearest main is common, and increasing. The town would be hard put to explain a refusal to give the necessary permits, once plans satisfactory to state sanitary officials had been approved.

We have previously ruled that a comprehensive permit could be so conditioned, and that a refusal by the town to allow an applicant access to an existing way could be found to be an unreasonably restrictive requirement which the Committee (and the Local Board) could set aside.[16]

The proposed system was examined by the town sewer supervisor and by a staff member of the firm of Metcalf

[16] Woodcrest Village v. Board of Appeals of Maynard. H.A.C. decision at pp. 15, 19.

and Eddy, the town's sewage consultant, and found to be acceptable and in accord with good engineering practice.

We find that the proposed sewage disposal system presents no health hazard.

2. *Drainage*

Testimony as to proposed arrangements for drainage was provided by Peter Ogren, Civil Engineer, of the firm of Hayes Engineering Co., the Appellant's drainage consultant. He visited the site, made soil tests, and designed the system.

He testified that the percolation rate of the soil would be adequate for a sewage disposal field (which is not contemplated here), a much more intensive use than drainage, (4-14). There was no ground water in the Spring down to a depth of four feet. Surface drainage will be designed to balance increased run off from roofs and paved areas by increasing site storage capacity.

The site slopes gently southward. Present plans call for site grading to flow the water, in heavy rains, to a leaching trench, which will function as a holding pond, permitting rain to leach into the soil, (Tr. 4:15). Water which now flows off the site will continue to do so, generally in a southeasterly direction.

Here again, the Appellee rebutted only through cross examination and argument. As in the case of detailed sewer plans, we have repeatedly ruled (beginning with our first decision in the Hanover case, affirmed by the S.J.C.) that detailed drainage plans cannot be required of an applicant for comprehensive permit at the application stage. They can be required at the construction stage.

We rule that the proposed site drainage system presents no health hazard.

3. *Traffic*

A specific safety ground on which the Board's denial was based related to traffic hazards. The Board noted that:

> The proposal calls for an entrance-exit at the intersection of Common Street and Stockbridge Road which the Board feels is an already dangerous intersection. We feel that the safety of the public and the owners of the proposed housing would be seriously endangered by the increased traffic flow in and out of the area. (Board Decision p. 2).

Testimony on this issue was submitted on behalf of the Appellant by Stanley Siegel, a traffic engineer, and on behalf of the Appellee by Dorothy Page, a long-time area resident.

Mr. Siegel made three traffic volume studies and several site visits. In particular he examined the access point to the Stockbridge Road parking lot and the nearby Stockbridge Road-Common Street intersection, referred to in the Board decision. He concluded that adequate line of sight existed in both directions and that no traffic hazard was presented, (Tr. 4:59).

In this connection, it should be observed that of the accesses to the three parking spaces, two enter from Meeting House Lane, a low volume street. Only one enters from the higher volume Stockbridge Road, and that one services only seventeen of the proposed sixty parking spaces.

Ms. Page's testimony was based on personal observation over a long period of residence. She testified that sometimes she has waited five minutes to cross the street, and has frequently heard the screech of brakes (Tr. 4:30). She testified that the traffic is particularly heavy on Saturdays and Sundays when local residents visit the dump further up Stockbridge Road.

Mr. Siegel, on cross examination, testified that he had not taken any traffic count on a week-end, (Tr. 4:120).

Ms. Page, on cross examination, testified that the scheduled closing of the dump would "help a lot", (Tr. 4:31).

Admittedly, more housing units mean more traffic. We cannot find, however, on the evidence, that the existing volume of traffic, plus the projected increase in volume from this project, together with the decrease from the projected closing of the dump add up to a serious safety hazard.

We rule generally that no health or safety hazards exist, or will be created by the proposed construction, of gravity sufficient to outweigh the regional housing need.

E. *Consistency With Local Needs: Site and Building Design*

It was in the area of site and building design that the Appellee mounted the strongest attack against this proposal.

Valid planning objections existed in this area, it was contended, of such magnitude and gravity as to outweigh the regional need for this housing as set out in the statutory test.

Under the general heading of building design, the Appellee attacked the exterior design of the buildings as too drab, and the interior design as inadequate under governmental standards to meet the needs of low income families.

Site design came under the even stronger attack. It was contended that building placement on the site was badly designed; that the site was poorly chosen; that other adequate sites were available; that there might be legal prohibitions to its proximity to the subsidized elderly development at Wheeler Park; that in any event it was poor planning practice to concentrate subsidized housing in this part of Scituate; that the project was a disruption of Scituate's

orderly plan for the development of subsidized housing; that the project constituted a radical change in the character of the neighborhood; and in particular, threatened the historical character of the locality, which was of special uniqueness and worthy of being preserved.

1. *Building Design*

The town house type of design was chosen for aesthetic and practical reasons. The neighborhood is predominantly single family, though differing substantially in age and design. While a project of single family houses might blend less obtrusively, the economic facts of life preclude this for a practical low-rent subsidized housing. The town house, with wood exteriors, garrison-type overhang, low and sloping roof lines, vertically proportioned windows, reminiscent of garrison-colonial architecture, with individual entrances and yards, and lack of common corridors, is the best transition between single family detached houses and garden apartments. This was the opinion of John Chesley, an architect and Chairman of Scituate's Planning Board,[17] Charles E. Downe, the Town's Planning Consultant,[18] and John Brown, the Appellant's planning consultant.[19]

We do not share the opinion of Charles Chaloff, an architect testifying for the Appellee, that the buildings were "plain and drab" and not in keeping with the neighborhood, (Tr. 4:4). The testimony of John Clancy, who designed this development, reflected a keen awareness of the practical and aesthetic problems in blending this forty unit development into the neighborhood, and his concern for

[17] Tr. 4:48;

[18] Multi Family Housing Study, Scituate, MA. March 1972 by Charles E. Downe. Hereinafter referred to as the [Downe] Report.

[19] Tr. 3:49.

such details as interesting shadow lines exemplified his sensitive solution to these problems.

While Mr. Chaloff found bedroom sizes to be generous, and living and dining areas to compare favorably with F.H.A. standards, he did testify that room sizes in a number of units do not meet F.H.A. minimum standards. He did not evaluate the proposal against M.H.F.A. standards, although he conceded that M.H.F.A. would be the funding agency, (Tr. 4:3-5).

We rule that the proposed development meets the requirements of the statute relating to the need to promote better design in relation to the surroundings.[20] This ruling is not intended to prevent the funding agency from requiring such changes in the building design as are necessary to meet their design criteria.

2. *Site Design*

(1) *Physical Design of Site*

The town houses are arranged in four buildings on the five acre site, around an open play and recreation area of two acres. Approximately four-fifths of the area is open, uncovered by buildings or paved areas. Density is 8.1 units per acre, which compares favorably with the eight units per forty thousand feet recommended in the town's Downes Report.[21]

The town houses are arranged so that their formal entrances front on Stockbridge Road or Meeting House Lane, conforming to the orientation of surrounding houses. The houses are set back fifty feet, this area landscaped with perimeter foliage which blends with existing growth.

The action sides of the house face toward the landscaped open center of the site, which is developed as a children's

[20] G.L., c. 40B, s. 20.

[21] Multi Family Housing Study Appellant Exhibit No. 11 at p. 5.

play area, and other recreational uses, not impinging on neighboring streets.

(2) *Location of the Site*

This innocuous subheading includes and in part conceals the interplay of the historical opposition to the entire Chapter 774 program, and the extent to which it contributes to the arguments raised against this proposal, some legitimate under the statute, and some [illegitimate].

The arguments cluster under the statutory reference to "the need" to promote better site and building design in relation to the surroundings . . .[22]

The illegitimate arguments, though politely stated, mask overtones of social bias which are totally repugnant to the legislative purpose of the statute. It is such arguments which have given the Chapter 774 program its rather pejorative popular title of "anti-snob zoning law". We dealt with this subject in our Maynard decision, where the arguments were rather baldly advanced. Of the mild hint in this case that this cooperative development may invite social ostracism we say simply that it is not relevant under the statute.[23]

a. *Architecture of Surrounding Neighborhood*

The relationship of this development, from a design point of view, to the surrounding neighborhood, *is* a legitimate concern of the statute. While, as indicated, it is a subject which H.A.C. may defer to the judgment of the highly able design team of M.H.F.A.,[24] we comment about it here because it was so strongly advanced during the hearing and in the arguments.

[22] G.L., c. 40B, s. 20.

[23] See Board Decision, p. 2.

[24] H.A.C. Decision: Woodcrest Village v. Board of Appeals of Maynard.

The presented evidence, plus the site view taken by members of the Committee discloses an old, pleasant, settled suburban neighborhood, with mostly single family homes. Although [predominantly] of colonial style, they vary in age and architectural style ranging from the historic Mann House to 1 story builder houses of the 50's, to a 1972 "log-cabin" reproduction, to the recently sold "raised ranch" previously owned by the Intervenor built in 1970.[25]

Mr. Brown, testifying for the Appellant, stated that there was no predominant style, except that they are primarily single family.[26]

Mr. Chaloff, the Appellee's architectural witness, after viewing a number of photographs described the architectural character of the neighborhood as "mixed".[27]

In addition to the single family houses, the area contains three cemeteries, a one story modern school, a recently built elderly housing project and a boarding house.

We have already referred to the Town's Downe's Report on Multi-Family Housing which characterizes the town house as the ideal architectural transition from single family to multi-unit housing.

We find nothing in the proposed design which architecturally outrages the neighborhood. The proposal must still pass the final criteria of the members of M.H.F.A.'s design team. Our finding by no means is intended to bind them in the free exercise of their critical judgment.

b. *Proximity to Wheeler House*

Wheeler Park is a state aided elderly housing development of forty units, built in 1967. An additional 78 units have been approved.

[25] See Appellee's Exhibit No. 13 L.
[26] Tr. 3:74, 48.
[27] Tr. 4:10. See Appellant Exhibit No. 15.

The objection that the proposed development is "too close" to Wheeler Park is based on several grounds. Some are expressed in the Board's decision (on page 2): that this proposal would have an adverse effect on the existing and proposed elderly housing, have a detrimental effect on the neighborhood, amount to a social and economic segregation of the families who are to reside there, and nullify and substantially derogate from the intent and purposes of Scituate's zoning by-law.

The brief of the Intervenor, on pages 8 and 9 paints a moving picture of the elderly of Wheeler Park basking in pastoral serenity, whose peace will be rudely "shattered" and who are "physically intimidated" by the "bustling" activity of the proposed project. "Surely no rule of law or reason exists to permit a private developer (a church sponsored organization proposing co-operative housing for low-income families) to cause such havoc . . ." . . . the value of millions of tax dollars spent on Wheeler Park will be lost or seriously impaired.

A more cogent argument is presented in the Appellee's brief (pp. 16, 17, 18) which quotes statutory language to the effect that prior to granting approval for construction of a new low-income housing project the Housing Board (now the Department of Community Affairs) must find that "the proposed project is not located adjacent to nor within one eighth mile of an existing project."[28] The proposed project is in fact within one eighth mile of Wheeler Park. (Tr. 5:49).

[28] Originally passed as St. 1966, c. 705, added to the General Laws as G.L., c. 121, sec. 26AA(b)(ii), and so cited in the Appellee's brief. In the "recodification" of existing housing statutes in 1969 (St. 1968, c. 751), chapter 121 was repealed, but most of its provisions were carried over into the new G.L., c. 121B. The one-eighth mile provision now appears in G.L., c. 121B in section 31(b)(ii).

The one eighth mile provision relates to so-called "705" housing which is state-aided low-income subsidized family housing. It refers to two low income *family* housing projects built by a housing authority, and specifically excludes elderly housing. There is no stricture against building a second elderly housing project even adjacent to a first,[29] or against building a family project within one eighth mile of an elderly project. In any event the statute does not apply to this privately financed low and moderate income housing.

The Appellee's brief recognizes this distinction at page 18 . . . "Chapter 705 is not directly relevant to this appeal." The Appellee argues, however, that it does reflect a legislative policy which should impel the Committee not to permit this family project within one eighth of a mile of an elderly project.

We recognize no such legislative policy. We recognize a legislative policy to keep two 705 subsidized family project as least an eighth of a mile apart. But the legislature has not extended that policy to the situation where one of the projects is an elderly project, and we see no reason why H.A.C. should so extend it.

We do recognize, however, another legislative policy, clearly expressed in the passage of chapter 774 which negates the reasons adduced in the Board's decision (p. 2) and in the Intervenor's brief.

We do not find that the forty units of proposed housing will have a detrimental effect on the neighborhood; we do not find that the admittedly attractive Wheeler Park will be damaged aesthetically or financially by the equally attractive proposed development; to the extent that the intent and purposes of Scituate's zoning by-laws forbid this development, we find them restrictive under the Statute; and we have already commented about the "ecomonic

[29] Indeed the proposed addition to Wheeler Park is an example.

and social segregation" that will be visited on the new residents.

c. *Historic Area*

Almost a full session was devoted to hearing the testimony of Ms. Catherine Laidlaw, the devoted President of the Scituate Historical Society. She described important historic features of the neighborhood; Mann House which will be a beautifully restored representation of Early American architecture, and an important educational center and museum (Tr. 4:76-81); the Men of Kent Cemetery with over one hundred graves dating back to the 1600's; the colonial muster ground, now a common.

She was concerned that the proposed development would impair the historical significance of the area; ". . . the "size and proportions of the buildings" and "the fact that there are so many of them so close together" "would (take) away from the atmosphere of this area", (Tr. 5:38)."

Another concern of Ms. Laidlaw was that the addition of forty units of housing would aggravate existing security problems in protecting historic sites. She described damage to fragile grave-stones that had already taken place, and the alarm system and caretaker already provided to protect Mann House, (Tr. 5:13).

Although steps had been instituted in 1973, neither the Mann House nor the Men of Kent Cemetery are in the National Register, (Tr. 5:41).

Miss Polly Ann Matherly Rettig, Historian of the Massachusetts Historical Commission stated that the Thomas Mann House is an "obvious (choice) for the nomination to the National Register of Historic Places". (Appellee's Exhibit No. 9). She testified, however, that to date "nothing has been done in terms of official protection of the area".

In a letter to Ms. Laidlaw written in March 8, 1973, Ms. Rettig (nee Matherly) stated, of potential future development of this site, ". . . construction of a building here in an architectural style or scale which is not compatible with the surrounding buildings and their setting could have a serious effect on the visual quality of the entire area".[30]

The letter does not indicate that Ms. Rettig was referring to the site or building design of this development. With respect to this particular development, she testified that if the proposed housing were in being, a subsequent application to designate the area would not be rejected because of its existence, (Tr. 5:59-60).

Particularly significant is a letter Ms. Rettig wrote to Rev. M.F. Groden on March 14, 1973, less than a week after her letter to Ms. Laidlaw.

> "Certainly, historic district controls should not be used to 'freeze' particular areas or to create museum villages. New buildings may be necessary to meet the needs of developing communities and those which are well-designed and constructed of appropriate materials can be definite assets to historic districts. Cities and towns should, in fact, employ historic districting not only as a means of protecting significant areas but as a planning tool through which they can encourage high quality in designs for new buildings and achieve a compatible mix of traditional and modern architectural styles."

We have already indicated that we do not find the buildings or the site design architecturally repugnant to the neighborhood. While the addition of new residents means increased security problems, as it also means increased

[30] Appellee Exhibit No. 9.
[31] Appellant Exhibit No. 14.

traffic, the remedy is not to deny the housing but to increase counter-measures to deal with these security problems.

Insofar as historical concerns come under the general heading of site and building design under the statute, we find the existence of no historical concerns which outweigh regional need for the proposed housing.

d. *Other Planning Issues*

The Board decision stated, on page one thereof that ". . . this petition is unique in that Scituate is the first municipality within the Commonwealth with an implemented program of subsidized housing to have an appeal under the procedures of Chapter 774. Therein lies the Board's main objection to this proposal. Scituate . . . with 80 units . . . 82 scheduled . . . and 15 single units under the D.C.A. rental plan ranks second in comparison to the 101 cities and towns comprising the M.A.P.C. The Board feels that the town has embarked on an orderly plan toward compliance . . . of chapter 774 well within the spirit of the law."

The contention that Scituate is the first municipality with a subsidized housing program to receive an application for a comprehensive permit, or that it ranks second in any comparison with other communities in the M.A.P.C. district is not borne out by the evidence, even if these contentions were relevant under the statute, which they are not.[32]

Equally irrelevant under the statute are arguments advanced in this case, already ruled on in previous decisions: that other communities in the region have not met their minimum obligations under the statute;[33] that there are available other sites more acceptable for the proposed

[32] Tr.: 2 46-47
[33] H.A.C. Decision: Whitman House v. Weymouth Board of Appeals.

use in the opinion of the town;[34] that the proposed housing impacts on the tax base or on the school system.[35]

The suggestion in the Board decision (pp. 1-2) that "The D.C.A. in setting forth its criteria for deciding appeals has suggested that the development of this type housing be done through a local housing authority . . ." is erroneous. Housing authorities have legal power to construct only *low* income housing, not *low and moderate* income housing.

No argument was raised that the proposal violates the "open space" requirements of the statute, (Tr. 5:65).

e. *Local Effort*

A strong argument was advanced in the Appellee's brief that the Housing Appeals Committee, in weighing need against "legitimate local concerns" must consider the extent of the local effort to meet its minimum housing requirement as set forth in section 20.[36]

The Committee is in strong sympathy with the concept of recognizing local effort, in carrying out its mandate under Chapter 774.

The argument, however, clouds the statutory definition of consistent with local needs.

The mathematical criteria of the statute are very exact. Either the minimum parameters have been met or they haven't, and differing consequences flow therefrom. In this area, the local effort to meet the statutory minima can be recognized and rewarded only after the statutory minima have been met.

In the area of balancing need against health, safety and design factors, there is more room to recognize local effort.

[34] See footnote 33.

[35] H.A.C. Decisions: Woodcrest Village v. Maynard Board of Appeals, Wilson Street Trust v. Norwood Board of Appeals.

[36] Appellee's Brief, p. 23 ff.

Thus, for instance, we would give more weight to an alleged traffic hazard where the evidence showed that the town had taken all reasonable measures to reduce the hazard, and yet a great measure of danger continued to exist. Other examples could be multiplied.

The local effort alleged here is that the town is moving to meet its mathematical minimum housing requirement. As indicated, the statute provides no formula for according differential treatment in such instances.

f. *Use of BOCA Code*

The Appellant sought to build under the BOCA code in lieu of the Scituate Building By-law, alleging a number of reqirements in the local code which unreasonably increased the building costs of this development. This request was denied in the Board's decision (pp. 2-3) and was the subject of considerable argument in the briefs of the parties.[37]

The enactment of St. 1972, c. 802, effective January 1, 1973, which brought all construction throughout the state under the State Uniform Buiding Code, which is modelled on the BOCA code has in effect, rendered that issue moot.

F. *Environmental Requirements*

Massachusetts Environmental Policy Act (M.E.P.A.) requires in G.L., c. 30, s. 61 that H.A.C., as a state agency, make certain environmental findings before granting a comprehensive permit. Section 62 requires that an environmental assessment form (E.A.F.) be prepared, and if it discloses significant potential environmental impact, an en-

[37] Appellant Brief at p. 15; Appellee Brief at pp. 12-15. See also H.A.C. decisions: Lexington Interfaith v. Board of Appeals of Lexington, Aug. 27, 1973. Community Development v. Board of Appeals of Billerica, Aug. 5, 1974.

vironmental impact report (E.I.R.) be prepared and published.

Under regulations promulgated by the Secretary of Communities and Development, approved by the Secretary of Environmental Affairs, H.A.C. is categorically exempt from complying with section 62, where the project is to be subsidized by M.H.F.A. H.A.C. may, in making its findings under section 61, rely on an E.A.F., and, if required, an E.I.R. prepared by M.H.F.A. and approved by the Secretary of Environmental Affairs.

These regulations, approved by the Secretary of Environmental Affairs implement legislative intent that its Environmental Policy be carried out. Such policy, however, does not require successive and expensive duplication of effort where two or more state agencies must make findings under Section 61 on the same project.

On November 6, 1973, M.H.F.A. prepared a negative E.A.F. which received the concurrence of the Secretary of Environmental Affairs on January 23, 1974.

III. *FINDINGS, RULINGS, AND ORDER*

In view of our subsidiary findings and rulings, and upon a review of the whole record, under the provisions of the G.L. c. 40B, s. 23, the Committe rules that the decision of the Zoning Board of Appeals of Scituate was unreasonable and not consistent with local needs.

The Housing Appeals Committee finds that the proposed project will not cause any environmental impact, and finds further that all feasible measures have been taken to avoid or minimize said impact, and that no environmental impact report is necessary, all in accordance with G.L. c. 30, ss. 61-62, the rules and regulations of the Secretary of Environmental Affairs, and the Statement of the Secretary on Environmental Assessment form dated January 23, 1974.

The decision of the Board is hereby vacated and the Board is directed to issue a comprehensive permit to the Appellant.

Said comprehensive permit shall provide for a housing development on the locus which is the subject of this appeal in the approximate number of units and design as presented before the Housing Appeals Committee.

Said comprehensive permit shall include all permissions necessary to complete the construction of said housing development which would otherwise be required from local boards, departments, or agencies of the Town of Scituate, including, but not limited to, permission to open Meeting House Lane for the purpose of laying a sanitary sewer therein. Said comprehensive permit shall be subject to the following conditions:

1. Construction shall comply with the provisions of the State Uniform Building Code as provided by St. 1972, c. 802 effective January 1, 1973.

2. No construction shall commence until detailed construction plans and specifications, substantially in accordance with the preliminary plans submitted to the Housing Appeals Committee, shall have been approved by the Massasetts Housing Finance Agency and until said Agency has granted a construction mortgage loan for the construction of the project.

3. Compliance inspections shall be carried out by local officials in the usual manner. In the event that disagreement between the builder and local officials arises, certification by the Department of Community Affairs, if requested, shall be adequate proof of compliance with any requirement under the comprehensive permit, or any of the other terms of this order.

4. If anything in this decision would seem to permit the building or operation of the project in accordance with standards less safe than the applicable building and site plan requirements of the agencies financially assisting the project, the standards of such agencies shall control.

5. That in the event that the Massachusetts Housing Finance Agency shall require that a new corporation be created to serve as mortgagor, this comprehensive permit shall be transferred, without further charge and upon presentation of written notice to this effect by the Appellant to the Board of Appeals, to such a new non-profit corporation, provided that a majority of the officers and directors or trustees of said corporation are officers and/or directors of the Planning Office for Urban Affairs, inc.

Date: March 14, 1975

HOUSING APPEALS COMMITEE
/s/ Maurice Corman
Maurice Corman, Chairman
/s/ William C. Ames
William C. Ames
/s/ C. Wesley Dingman
C. Wesley Dingman